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No. 91-473

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GULF STATES UTILITIES COMPANY,
Petitioner,
v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Louisiana

BRIEF *AMICUS CURIAE* OF
EDISON ELECTRIC INSTITUTE
IN SUPPORT OF PETITIONER

November 18, 1991

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QUESTION PRESENTED

Whether a state regulatory commission violated a utility's due process rights when one of the commission's members publicly advertised his predetermined opinion of the outcome of the prudence review and the commission permitted retained staff advocates, acting first as investigators and prosecutors, to then advise the commission as fact-finder and draft the report which essentially became the final order disallowing recovery of and on hundreds of millions of dollars of utility investment.

(i)

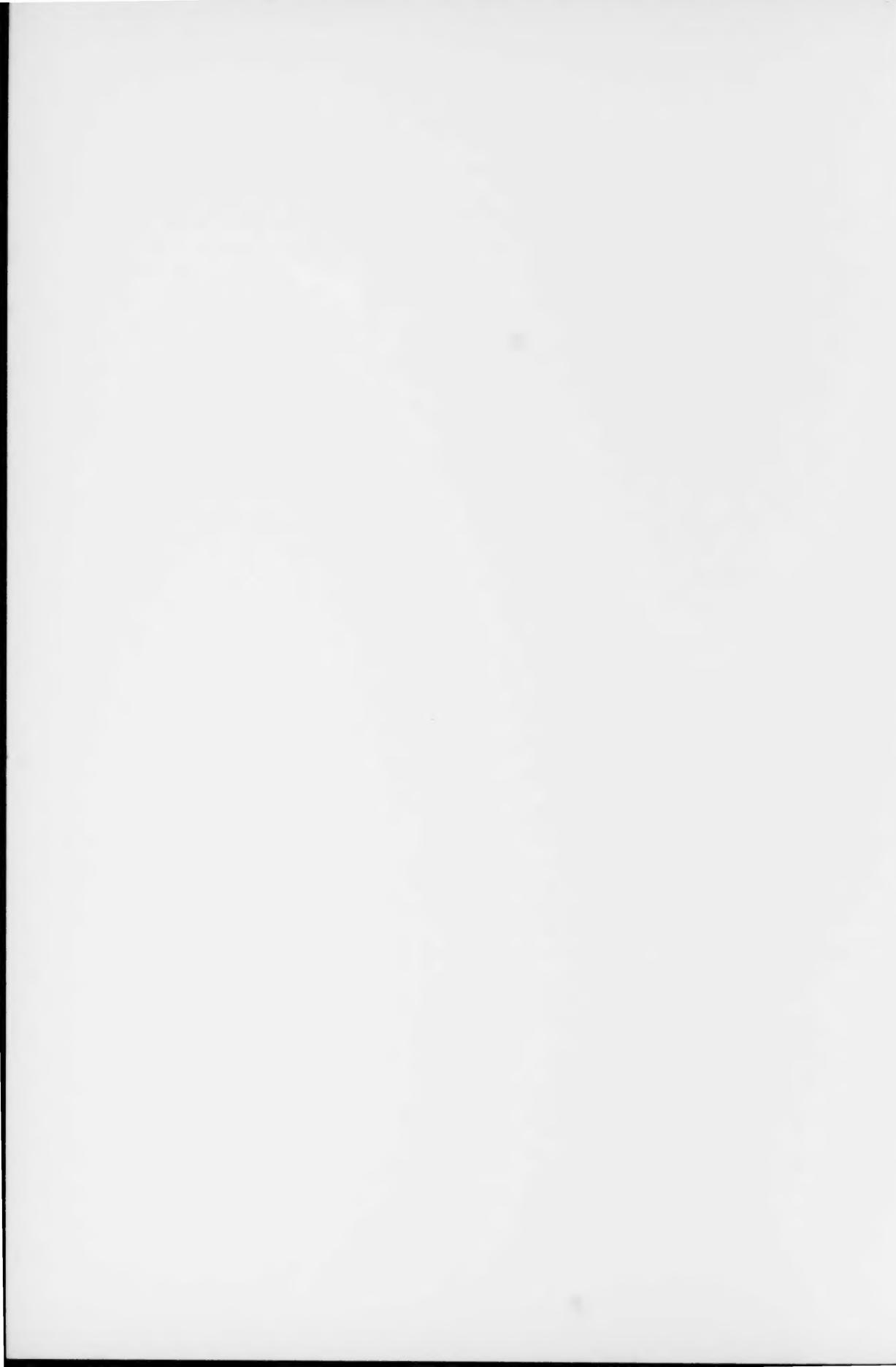


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**BRIEF *AMICUS CURIAE* OF
EDISON ELECTRIC INSTITUTE
IN SUPPORT OF PETITIONER**

Amicus curiae, Edison Electric Institute (EEI), respectfully prays that the Court grant the petition of Gulf States Utilities Company (Gulf States or GSU) for a writ of certiorari to the Supreme Court of Louisiana in this matter.

All of the parties to this case—Gulf States, the Attorney General of the State of Louisiana, and the Louisiana Public Service Commission (the Commission)—have consented to the filing of this brief and copies of those consents are being filed with the Clerk of the Court concurrently with this brief.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the association of the nation's investor-owned electric utility companies. Its members serve 98 percent of all customers served by the investor-owned segment of the electric utility industry. They generate approximately 78 percent of all the electricity used in the country, and serve 75 percent of all ultimate electricity consumers in the nation. Gulf States is a member of EEI.

EEI's members sell electricity at rates subject to approval by state or federal utility commissions or by both. Therefore, EEI and its members have a substantial interest in assuring that regulatory proceedings are conducted consistent with due process and fundamental fairness so that all parties to such proceedings are accorded just and impartial decisions. EEI appears in this case to support the position of Gulf States that it is entitled to a fair decision-making process, which at a minimum affords protection from the undue influence of any one party.

SUMMARY OF ARGUMENT

The facts and circumstances of this case taken as a whole present a clear and egregious violation of Gulf States' due process right to a fair and unbiased decision-making process. The decision at issue involved the determination of the prudence of the decision to resume construction of a multibillion dollar (nuclear) electric generation facility (the River Bend Plant), in the context of establishing retail rates reflecting Gulf States' investment in that plant. Even before the proceeding began, one of the Commissioners, who would subsequently vote on Gulf States' prudence, advertised to the public that he believed Gulf States had been imprudent. After a lengthy hearing before a Commission hearing examiner, the Commission directed outside consultants, who had testified under oath in the hearing against Gulf States, to prepare a Report of the proceedings which the Commission largely adopted as its final order. In this order,

the Commission disallowed the recovery of and return on \$677 million of Gulf States' investment as imprudent.

Due process demands a certain minimum level of procedural fairness during a state regulatory proceeding to review the prudence of a major utility investment. Under all the facts presented here, the procedure taken as a whole cannot be said to have afforded Gulf States that minimum level of fairness. Gulf States did not receive a fair and unbiased decision-making process required by the guarantee of due process embodied in the Fifth and Fourteenth amendments to the United States Constitution.

ARGUMENT

As a result of the investment disallowed by the Respondent in this case, Gulf States has been prevented from recovering and earning a return on \$677 million of its multibillion dollar investment in a large generating plant (River Bend Nuclear Unit 1), despite the fact that that investment is now and has been providing a needed and valuable service to the customers of Gulf States and citizens of Louisiana. This deprives Gulf States of a substantial property interest.¹ Such a substantial interest must be afforded due process protection. This Court has firmly recognized this principle. In *Mathews v. Eldridge*, the Court stated that the level of required due process would depend upon three things:

¹ The proceeding addressed the extent to which Gulf States would be able to recover and earn a return on its investment in that plant. That question in turn involved a determination as to whether Gulf States' conduct in making that investment was prudent, or reasonable given the circumstances and historical context at the time investment decisions were made. GSU Petition, App. at 225a, 227a-28a. Such determinations are necessarily based upon specific historical facts and evaluations of those facts. Because a finding of imprudence can preclude any recovery of or return on all or part of an investment, a regulatory commission's resolution of prudence issues in rate proceedings can have a substantial financial effect on regulated utilities.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976).²

The only commissioner who attended a significant portion of the evidentiary hearing had, prior to the hearing, taken out newspaper advertisements announcing his conviction that Gulf States had acted imprudently in deciding to resume construction of River Bend instead of building a coal plant and urged the public to write to other Commissioners to support this view. GSU Petition n. 29, at 23; App. 336a. He clearly and publicly expressed a pre-existing conclusion concerning the very issue ultimately to be determined by this proceeding.³ Given one

² See K. Davis, *Administrative Law Treatise* § 13:12 (1979), *Supplement* § 13:12 (1989); *National Fuel Gas Dist. Corp. v. TGX Corp.*, 749 F. Supp. 466, 471-73 (W.D.N.Y. 1990).

³ Professor K. Davis, *Administrative Law Treatise* § 19:4, at 382-83, 388 (1980), notes that bias or prejudgment can taint the entire decision-making process. See *Antoniu v. S.E.C.*, 877 F.2d 721 (8th Cir. 1989), *cert. denied*, No. 89-835 (1990) (speech delivered by a Commissioner outlining the facts of a securities broker's prior conviction manifested prejudgment in a related S.E.C. proceeding); *Miller v. City of Mission*, 705 F.2d 368 (10th Cir. 1983); *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977), *cert. denied*, 434 U.S. 907 (1977) (whole school board disqualified to dismiss superintendent after hearing involving adjudicative facts, because one board member had made public statements during election pledging superintendent's removal); *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (FTC chairman made public statements linking facts about case with obvious fraud while hearing examiner's report was being considered by the commission); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 764-65 (6th Cir. 1966) (FTC chairman disqualified due to pre-existing factual con-

Commissioner's pre-determined position, under any reasonable adherence to principles of due process it was incumbent upon the Commission to go to great lengths to demonstrate open-mindedness and fairness through the procedures it utilized.

Instead, outside lawyers and consultants hired by the Commission to investigate the prudence of Gulf States' activities, and who had appeared during the evidentiary process as sworn witnesses and advocates against Gulf States, were asked by the Commission to prepare a "Report" for the Commission's consideration. GSU Petition, App. H 261a-335a. As would be expected when an advocate is asked to prepare a report, the report supported the position of the hired consultants. *Id.* The hearing examiner assigned by the Commission to oversee the evidentiary process did not prepare any findings of fact. The Commission issued an opinion which largely adopted the consultants' Report in reaching its final conclusion. GSU Petition, App. E 183a-209a. The opinion failed in any meaningful way to respond to Gulf States' case as presented at the evidentiary hearing or Gulf States' arguments in reply to the consultants' Report.⁴ Given the above circumstances, Gulf States could not possibly have been accorded the fair and unbiased decision-making process required by due process.

elusions); *see also, Texaco Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965).

⁴ The Commission's failure to respond leaves a reviewing court able only to guess at the Commission's reasoning. That is unequivocally improper, and courts correctly and routinely refuse to be forced to guess at the thinking of decision-making bodies. *See, e.g., Citizens to Preserve Overton Pk., Inc. v. Volpe*, 401 U.S. 402, 419-20, 91 S.Ct. 814, 825 (1971) (review under the Administrative Procedure Act); *In re Permian Basin Area Rates Cases*, 390 U.S. 747, 791-92, 88 S.Ct. 1344, 1373 (1968) (review in the context of ratemaking); *see also, Exxon Corp. v. DOE*, 91 F.R.D. 26, 32-34 (N.D. Tex. 1981) (a complete administrative record is required).

In this case Gulf States is seeking only a minimal level of due process protection—one which is commonly followed in utility rate cases. *See* GSU Petition at 25. Because the hearing examiner had already presided over the evidentiary hearings, the Commission could have protected Gulf States' due process interest with very little difficulty or expenditure. *Mathews v. Eldridge*, 424 U.S. at 335, *see* GSU Petition at 25. At the very least, the examiner could have written an initial decision to deal fully and fairly with all of the arguments and evidence presented by Gulf States and the Commission's consultants. *Id.* That would certainly not have been any more expensive or difficult than paying the hired "staff" to write such a report. Had that been done, the consultants' Report could then have appropriately been treated for what it was, an advocate's brief.

In order to meet their statutory obligation to serve their customers, utilities make investments in new plants when it is anticipated that customer demand will grow. Utilities cannot finance such investments unless they are permitted by regulatory commissions to earn a return of and on such investments. This may cause rates to increase, thereby introducing a temptation for regulators to deny the recovery of and on the investment actually required—the bigger the investment, the greater the temptation. However, such temptation, no matter how strong, cannot sanction a regulatory commission's circumvention of minimum due process protections in order to achieve a pre-determined result. The ratemaking process must be conducted fairly.⁵ The facts and procedures followed in this case show a clear lack of fair and due process.

When procedures such as those followed in this case so offend basic notions of fundamental fairness, this Court is called upon to remedy such a grievous wrong. EEI urges the Court to declare that due process guaran-

⁵ *See generally*, K. Davis, *Administrative Law Treatise* § 18.6 (1980).

tees afford minimal procedural protections to insure that Gulf States and other utilities subject to prudence reviews are accorded a fair and impartial decision-making process from an unbiased decision-maker.

CONCLUSION

WHEREFORE, Edison Electric Institute prays that the Court grant Gulf States Utilities Company's Petition for a Writ of Certiorari to the Supreme Court of Louisiana in this matter.

Respectfully submitted,

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